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R.P. 17-18
ADM 9-03 OT:RR:RD:TC
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**DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION**

DEPARTMENT OF THE TREASURY

19 CFR Parts 127 and 133

USCBP-2019-0031

RIN 1515-AE35

Disclosure of Information Regarding Abandoned Merchandise

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the U.S. Customs and Border Protection (CBP) regulations pertaining to disclosure of information regarding merchandise bearing suspected counterfeit trademarks. The proposed amendment would create a procedure for the disclosure of information otherwise protected by the Trade Secrets Act to a trademark owner when merchandise bearing suspected counterfeit trademarks has been voluntarily abandoned.

DATES: Comments on the proposed rule must be received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by docket number, by *one* of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP 2019-0031.
- Mail: Trade and Commercial Regulations Branch, Office of Trade, Regulations and Rulings, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, D.C. 20229-1177.

Instructions: All submissions received must include the agency name and docket number for this proposed rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the proposed rulemaking process, see the "Public Participation" heading of the SUPPLEMENTARY INFORMATION section of this document.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 325-0118.

FOR FURTHER INFORMATION CONTACT: Alex Bamiagis, Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, (202) 325-0415.

SUPPLEMENTARY INFORMATION:

PUBLIC PARTICIPATION

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

BACKGROUND

Among other responsibilities, U.S. Customs and Border Protection (CBP) enforces intellectual property rights (IPR) laws and regulations at the border. The majority of the CBP regulations prescribing these efforts are found in part 133 of title 19 of the Code of Federal Regulations (19 CFR part 133). Part 133 provides for the recordation of trademarks, trade names, and copyrights with CBP and prescribes the enforcement procedures applicable to suspected infringing merchandise. Part 133 also sets forth procedures for the detention, seizure, and disposition of articles violating certain IPR laws and regulations, including information disclosure to right owners in appropriate circumstances. Consistent with Executive Order 13785, this proposed regulatory amendment would allow the disclosure of certain information to a trademark owner in circumstances where goods have been voluntarily abandoned as described in 19 CFR § 127.12(b), if CBP suspects that the successful importation of the merchandise would have violated United States trade laws prohibiting the importation of merchandise bearing counterfeit marks.

I. The Trade Secrets Act and Disclosure of Information Pertaining to Certain Intellectual Property Rights Enforced at the Border

The Trade Secrets Act (18 U.S.C. 1905) bars the unauthorized disclosure by government officials of any information received in the course of their employment or official duties when such information “concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” 18 U.S.C. 1905.

Specifically, the Trade Secrets Act protects those required to furnish confidential commercial or financial information to the government by shielding them from the competitive disadvantage that could result from disclosure of that information by the government. In turn, this protection encourages those providing information to the government to furnish accurate and reliable information that is useful to the government.

The Trade Secrets Act, however, permits those government officials covered by the Act to disclose protected information when the disclosure is otherwise “authorized by law,” which includes both statutes expressly authorizing disclosure and properly promulgated substantive agency regulations authorizing disclosure based on a valid statutory interpretation. *See Chrysler v. Brown*, 441 U.S. 281, 294-316 (1979).

The Secretary of the Treasury thus has authority to disclose information otherwise protected under the Trade Secrets Act when such disclosures are authorized by law. Disclosures meeting the “authorized by law” standard of the Trade Secrets Act include those made pursuant to regulations that: (1) are in compliance with the provisions of the

Administrative Procedure Act (5 U.S.C. 551 *et seq.*); and (2) implement a valid statute. *Chrysler*, 441 U.S. at 294-96, 301-03.

Several provisions in titles 15 and 19 of the United States Code give CBP authority to promulgate regulations to enforce prohibitions against the importation of merchandise bearing infringing and counterfeit trademarks. The Lanham Trademark Act (15 U.S.C. 1124) authorizes the Secretary of the Treasury to promulgate regulations regarding trademarks and to aid CBP officers in enforcing the prohibitions against importation. Additionally, sections 526(e) and 596 of the Tariff Act of 1930, as amended (19 U.S.C. 1526(e), and 19 U.S.C. 1595a(c)), prohibit the importation of merchandise bearing a counterfeit mark and the introduction or attempted introduction into the United States of merchandise or packaging in which, *inter alia*, trademark protection violations are involved. Moreover, section 526(e) of the Tariff Act of 1930, as amended (19 U.S.C. 1526(e)), requires CBP to notify the owner of the trademark when merchandise bearing a counterfeit mark is seized. Section 624 of the Tariff Act of 1930, as amended (19 U.S.C. 1624), authorizes the Secretary of the Treasury to promulgate regulations to carry out the provisions of the Tariff Act of 1930, as amended. Collectively, these statutes authorize the Secretary of the Treasury to disclose certain importation information to right owners to assist CBP in its IPR enforcement efforts. Disclosure of this information to right owners can help CBP prevent the importation of infringing and counterfeit merchandise by identifying sources or channels of violative shipments.

If CBP suspects that an article imported into the United States bears a counterfeit mark, it may detain the article for up to 30 days from the date on which the merchandise is presented for examination. 19 U.S.C. 1499; 19 CFR 133.21(b). During the detention

period, and in accordance with 19 CFR 133.21(b)(4), CBP may disclose to the owner of the mark limited importation information if CBP concludes that the disclosure would assist CBP in determining whether the imported article bears a counterfeit mark. CBP also discloses to the owner of the mark comprehensive importation information after CBP seizes merchandise for bearing a counterfeit mark in accordance with 19 CFR 133.21(e).

II. Voluntary Abandonment of Merchandise Suspected of Bearing Counterfeit Marks

As noted in a 2018 report issued by the Government Accountability Office (GAO), “the growth of e-commerce has provided additional opportunities for counterfeiters to deceive consumers...” and challenged CBP’s ability to prohibit the importation of counterfeit merchandise. U.S. Gov’t Accountability Office, GAO 18-216, “Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market,” *Report to the Chairman, Committee on Finance, U.S. Senate*, p. 10-11 (2018). The report notes that e-commerce merchandise is increasingly imported in low-value shipments arriving via express consignment or international mail. *Id.* Such shipments often are voluntarily abandoned if CBP detains the merchandise on suspicion of an IPR violation. The cost of demonstrating to CBP that a shipment is legitimate may outweigh the importation’s value, and importers frequently fail to respond to CBP inquiries. Instead, some of these importations may be voluntarily abandoned (*see* 19 CFR § 127.12(b)) after CBP has detained the merchandise on suspicion of an IPR violation.

Section 302 of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. No. 114-125; 130 Stat. 149; Section 628a of the Tariff Act of 1930 (19 U.S.C. 1628a)) provides CBP with authority to disclose information to right holders in certain situations

when it would assist CBP in determining if the merchandise is being imported in violation of the copyright or trademark laws. Under the current regulations in part 133, however, when merchandise is voluntarily abandoned, trademark owners do not receive the importation information that would be provided if merchandise bearing a counterfeit trademark were seized. In fact, the regulations in part 133 are silent with respect to IPR enforcement against merchandise that has been voluntarily abandoned.

III. Explanation of Proposed Amendment to Part 133

Executive Order 13785, “Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws,” instructs CBP to ensure that it can share information regarding voluntarily abandoned merchandise with right owners “to ensure the timely and efficient enforcement of laws protecting [IPR] holders from the importation of counterfeit goods.” 82 FR 16719 (March 31, 2017). As a result, CBP is proposing to add a new paragraph to 19 CFR 133.21. CBP is proposing to disclose the same comprehensive importation information provided to trademark owners when merchandise has been seized in cases where merchandise has been voluntarily abandoned, if CBP suspects the successful importation of the merchandise would have violated United States trade laws prohibiting importation of merchandise bearing counterfeit marks, and that disclosure would assist CBP in its IPR enforcement mission.

Under those conditions, the amendment would allow CBP to disclose the following information: the date of importation, the port of entry, the description of the merchandise, the quantity of the merchandise, the country of origin of the merchandise, the name and address of the manufacturer, the name and address of the exporter, and the

name and address of the importer. As in the seizure context, trademark owners may use this importation information to help CBP prevent IPR violations by identifying sources or channels of violative shipments.

IV. Other Conforming Amendments

Sections 133.21 to 133.25 currently cite to section 818(g) of the National Defense Authorization Act (NDAA) for Fiscal Year 2012 (Pub. L. No. 112-81; 125 Stat. 1496; 10 U.S.C. 2302 note) as specific authority. Section 302(b) of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. No. 114-125; 130 Stat. 122; Section 628a of the Tariff Act of 1930 (19 U.S.C. 1628a), as amended) terminated and replaced the NDAA authority. Because of these statutory changes, CBP is proposing to revise the specific authority citation for sections 133.21 to 133.25.

CBP is also proposing to add a new paragraph (c) in 19 CFR 127.12, cross-referencing the detention and disclosure provisions of 19 CFR 133.21(b) which may be applicable to voluntarily abandoned merchandise suspected of bearing a counterfeit mark.

STATUTORY AND REGULATORY REQUIREMENTS

I. Executive Orders 13563, 12866, and 13771

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing

Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

This rule is not a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed this regulation. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. *See* OMB’s Memorandum titled “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

II. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

Importers who voluntarily abandon merchandise consist of all types of businesses and individuals, including small businesses, so it is likely that a substantial number of small businesses are affected. However, the impact is not significant, because this rule would impose no new monetary costs to these importers. If they do not wish to have their merchandise’s information shared with the right owner, they may choose not to voluntarily abandon these goods. Therefore, CBP certifies that this rule will not have a

significant economic impact on a substantial number of small entities. Notwithstanding this certification, CBP invites comments about the impact of this rule, if adopted, on small entities.

SIGNING AUTHORITY

This rulemaking is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the authority of the Secretary of the Treasury (or that of his or her delegate) to approve regulations concerning trademark enforcement.

LIST OF SUBJECTS

19 CFR Part 127

Exports, Freight, Imports.

19 CFR Part 133

Counterfeit trademarks, Detentions, Disclosure, Restricted merchandise, Trademarks, Trade names.

For the reasons stated above in the preamble, CBP proposes to amend parts 127 and 133 of title 19 of the Code of Federal Regulations (19 CFR parts 127 and 133) as set forth below.

PART 127 – GENERAL ORDER, UNCLAIMED, AND ABANDONED MERCHANDISE

1. The general authority citation for part 127 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1311, 1312, 1484, 1485, 1490, 1491, 1492, 1493, 1506, 1559, 1563, 1623, 16241646a; 26 U.S.C. 5753.

2. Section 127.12 is amended by adding paragraph (c), to read as follows:

§ 127.12 Abandoned merchandise.

* * * * *

(c) If merchandise voluntarily abandoned pursuant to paragraph (b) of this section is suspected of bearing a counterfeit mark, it also may be subject to the detention and disclosure provisions of § 133.21(b) of this chapter.

PART 133 –TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

3. The general authority citations for part 133 continue to read as follows and the specific authority citations for §§133.21 through 133.25 are revised to read as follows:

AUTHORITY: 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1202, 1499, 1526, 1624; 31 U.S.C. 9701.

Sections 133.21 through 133.25 also issued under 19 U.S.C. 1628a; Sec. 302, Pub. L. 114-125.

4. In § 133.21, paragraph (b)(6) is added to read as follows:

§ 133.21 Articles suspected of bearing counterfeit marks.

* * * * *

(b) * * *

(6) *Voluntary abandonment and disclosure to owner of the mark of comprehensive importation information.* When merchandise that bears a mark suspected by CBP of being a counterfeit version of a mark that is registered with the U.S. Patent and Trademark Office and recorded with CBP pursuant to subpart A of this part has been voluntarily abandoned under § 127.12(b) of this chapter, CBP may disclose to the owner of the mark the following comprehensive importation information, if CBP determines the disclosure will assist in CBP's trademark enforcement:

- (i) The date of importation;
- (ii) The port of entry;
- (iii) The description of the merchandise;
- (iv) The quantity of the merchandise;
- (v) The country of origin of the merchandise;
- (vi) The name and address of the manufacturer;
- (vii) The name and address of the exporter; and
- (viii) The name and address of the importer.

* * * * *

Mark A. Morgan
Acting Commissioner
U.S. Customs and Border Protection

Approved: August 21, 2019

Timothy E. Skud
Deputy Assistant Secretary of the Treasury
[FR Doc. 2019-18317 Filed: 8/26/2019 8:45 am; Publication Date: 8/27/2019]